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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 9

ROBERT SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 232–244) is reported at 280 F. 2d 701. The opinion of the district court (R. 214–227) is reported at 148 F. Supp. 926.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (R. 244). The petition for a writ of certiorari was granted on March 27, 1961 (R. 245; 365 U.S. 857). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was apprised and was aware of the subject under inquiry.

2. Whether a Congressional committee may subpoena a person to testify if it has reasonable basis for believing that he possesses information of value to its investigation and, if so, whether the Internal Security Subcommittee had such information as to petitioner.

3. Whether the Subcommittee's investigation into Communist activities in news media violated petitioner's rights under the First Amendment.

4. Whether a defendant, who is indicted by a grand jury partly composed of federal employees, is entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors are biased and afraid as the result of the government security program.

5. Whether the indictment was invalid because it failed to specify the subject under inquiry.

STATUTE AND RESOLUTION INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) and the pertinent provisions of Senate Resolution 366, 81st Cong., 2d Sess. (1950), are set forth in petitioner's brief at pp. 3–4.

STATEMENT

Petitioner was charged in a three-count indictment with having unlawfully refused to answer three questions pertinent to matters under inquiry by the Sub-

committee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (R. 1–2). Having waived his right to trial by jury (R. 23), petitioner was found guilty by the district court on Counts 1 and 2. Count 3 was dismissed (R. 226). Petitioner was sentenced to six months' imprisonment and to pay a fine of two hundred and fifty dollars on each of the two counts, with the sentences of imprisonment to run concurrently (R. 231).

On appeal, the Court of Appeals for the District of Columbia Circuit ordered that hearings in this and seven other pending contempt of Congress cases—all of which involved refusals to answer questions asked by Congressional committees—"be deferred until after the decision of the Supreme Court in *Barenblatt* v. *United States* * * *." Following the *Barenblatt* decision (360 U.S. 109), the eight cases were assigned to a single panel of the court below, supplemental briefs were ordered filed in each, and oral arguments were heard. On June 18, 1960, the court of appeals reversed the convictions in two of the eight cases, *Knowles* v. *United States* and *Watson* v. *United States*, and unanimously affirmed the convictions in the other six, including that of petitioner. *Shelton* v. *United States; Deutch* v. *United States; Russell* v. *United States; Price* v. *United States; Liveright* v. *United States; Gojack* v. *United States.* This Court granted certiorari in the six latter cases, and at its last Term reversed the conviction in *Deutch* v. *United States* (367 U.S. 456). The other five cases, includ-

ing petitioner's, have been set for oral argument at this Term.

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Senate Internal Security Subcommittee heard the testimony of Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws (R. 71; Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate [hereafter "Hearings"], 84th Cong., 1st Sess., Part 14, pp. 1324–1363). Burdett, who said that he was a Party member from 1937 until the early 1940's, testified concerning attempts of the Communist Party to influence public opinion by infiltration of Party members into the newspaper field. He stated that he became a member of the Party's unit on the Brooklyn Eagle in 1937 while employed by that newspaper (Hearings, Part 14, p. 1324); that the unit included several reporters and editorial writers (*id.* at pp. 1325–1327, 1359–1360); that Party leaders induced him to become a foreign correspondent for the Eagle in order to use his position to act as an espionage agent for the Soviet Union and that he continued these activities while subsequently employed by Transradio Press and the Columbia Broadcasting System during World War II (*id.* at pp. 1328–1341, 1347–1353); and that employees of other New York newspapers had been Party members around 1940 (*id.* at pp. 1360–1363).

Subsequent to Burdett's testimony, the Subcommittee received information that a man by the name of "Shelton," said to be employed on the editorial or news side of the New York Times, was a member of a Communist group among the staff of that organization, that he was active in the affairs of this group, and that he was in a position to furnish the Subcommittee with information concerning Communist activity (R. 48–49, 98, 116). The first name of the person identified as "Shelton" was not given. Although this information came to the Subcommittee in a letter signed with a pseudonym, the identity of the writer was known to the former associate counsel of the Subcommittee, Robert Morris (R. 99–102, 190–191). The writer was considered to be reliable since other information he had given the Subcommittee had been checked and found to be correct (R. 101–102, 190).

Although the Subcommittee was still unaware of Mr. Shelton's first name, a subpoena was issued, addressed to "Willard Shelton" at the New York Times in New York City (R. 105). This name was a mistake since Willard Shelton was not the person actually sought by the Subcommittee (R. 49, 102). Counsel for the Subcommittee, Mr. Sourwine, later surmised, after an investigation by himself, that someone in the typing section of the Subcommittee staff confused the "Shelton" to be subpoenaed with one Willard Shelton, who is likewise a newspaperman but who was not employed by the Times or sought by the Subcommittee (R. 102–103).

The Subcommittee employee who went to New York City to serve the subpoena, along with other subpoenas, ascertained that no Willard Shelton was employed by the New York Times (R. 49, 106). He was told that a Robert Shelton (the petitioner) was an employee of that organization and he was the only "Shelton" on the editorial or news side (R. 49, 106). The Subcommittee employee added the words "or Robert Shelton" to the subpoena and upon instructions of the Subcommittee served the subpoena on petitioner (R 49, 105–106).

Between the time that the subpoena was issued and petitioner's appearance, the Subcommittee checked its various sources to secure further information concerning petitioner (R. 111). At that time, the Subcommittee had under the name Shelton (without a first name) three, four or five "leads" (R. 111). Because of this information, the Subcommittee desired to question petitioner concerning whether he was the Shelton who was not sufficiently identified by the Subcommittee's files (R. 111).

Petitioner, represented by counsel, first appeared at an executive session of the Subcommittee, in New York City on December 7, 1955 (R. 48). Petitioner was advised by Subcommittee counsel that the purpose of the appearance was to clarify the question of identity (R. 52). Upon being queried as to Communist Party membership, petitioner immediately responded that he had a statement to read (R. 52). The statement, which was then read, objected in substance to the Subcommittee's inquiry into petitioner's Communist

Party membership on the grounds that the Subcommittee lacked jurisdiction and the inquiry infringed his rights under the First Amendment of freedom of speech and, since he was a newspaperman, of the press (R. 53–55). Subcommittee counsel then told the Subcommittee that he was surprised by petitioner's refusal to answer the questions since petitioner was subpoenaed only for purposes of identification and he was not charged with being a Communist (R. 57).

The Subcommittee held public hearings in Washington, D.C., on January 4, 5, and 6, 1956 (R. 70–71). At the opening of the hearings on January 4, Senator Eastland, the chairman of the Subcommittee, announced that the hearings about to commence "stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster" (R. 71). Burdett had, the chairman continued, disclosed the names of persons whom he knew as members of the Communist Party in the early 1940's. The chairman concluded that the investigation was of great importance because (R. 71):

> [A]mong the persons involved in this investigation have been many who were or are members of the press, and * * * the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. * * * The present hearings open up a subsequent chapter to the Burdett testimony * * *.

Following the opening statement, another member of the Subcommittee, Senator Hennings, apparently apprehensive that the public might misconstrue the purpose of the hearings, further explained (R. 72–73):

> [T]his is not in any sense an attack upon the free press of the United States. * * *
>
> Of course, the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency. * * * [T]his is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

In response, the chairman approved Senator Hennings' description of the purpose of the hearings as a "very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety" (R. 73). The chairman went on to say (R. 73):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

Eighteen witnesses were called by the Subcommittee to testify at the hearings on January 4, 5, and 6, 1956. All had been or were then employed in mass commu-

nication. Clayton Knowles, who had previously given the Subcommittee information on Communist activity in newspapers (R. 75, 76), was among the witnesses called to testify on January 4. Knowles testified that he was then a reporter for the New York Times; that he was a member from 1937 to 1939 of the Communist Party unit of the Long Island Daily Press where he was a reporter; and that Party members at that time had positions of importance and exerted considerable influence in the American Newspaper Guild (Hearings, Part 17,[1] pp. 1635–1642).

On January 6, 1956 (two days later), immediately preceding petitioner's testimony, the hearings opened with the reading of a telegram sent to the Subcommittee by a New York newspaper, the Long Island Daily Press, in which that newspaper agreed with the Subcommittee's efforts to expose Communist infiltration wherever found (R. 74–75). The chairman, in responding to the telegram, repeated that the hearings were directed to investigating Communist infiltration into news agencies (R. 75–76). Senator Hennings stated (R. 77):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

The Subcommittee then called petitioner to testify. At petitioner's trial, Counsel Sourwine stated that

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[1] Part 17 of the Hearings is entitled *Strategy and Tactics of World Communism (Communist Activity in New York)*.

the reason petitioner was recalled by the Subcommittee was that he had refused to answer certain questions at the executive session (R. 81):

> They were questions in the area in which the committee wanted information. I was satisfied that he had such information, and I hoped that if he came on in executive session [sic], that perhaps he might change his mind and give it to us.

Mr. Sourwine further testified that "the question under inquiry before the subcommittee when the defendant testified" was (R. 138–139):

> Broadly, the question under inquiry was the scope and extent and activities of the communist conspiracy against the United States, more specifically, as it applied to the New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees.

Mr. Sourwine continued (R. 139):

> When the committee was questioning this particular witness, within the area of its much broader investigation, it was concerned with the particular area of that broader investigation which concerned communist activity among newspaper people, communist activity on the New York Times and communist activity in an effort to infiltrate the Typographical Union in New York.

At the start of his testimony before the Subcommittee on January 6, before he was sworn, petitioner interposed several objections to his having been called to testify. These objections included: an objection to the jurisdiction of the Subcommittee on the ground that petitioner's testimony in executive session made clear that no information would be obtained relating to the Subcommittee's legislative purpose; the claim that questioning "might subject me to prosecution in violation of my right to be tried in the community where I work and live"; and the statement that he did not "see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles" (R. 84).

After having been sworn, petitioner gave his name and stated that he had been employed first as a news clerk and then as a copy editor on the New York Times for the previous five years (R. 84–85). Petitioner was then asked: "Are you, sir, a member of the Communist Party, U.S.A.?" (R. 86). After consultation with his counsel, petitioner said that "I decline to answer on the grounds of the first amendment and challenge to the jurisdiction of the committee" (R. 87). He was then permitted to read a lengthy statement in which he restated his refusal to answer the question on the basis of the First Amendment and the lack of jurisdiction of the Subcommittee to investigate beliefs and associations (R. 87–91). These objections were predicated principally

on the claim that the Subcommittee was investigating newspapers, which violated freedom of the press. The objections were overruled by the chairman, who ordered him to answer the question (R. 91). Petitioner persisted in his refusal to answer the question on the grounds set forth in his statement (R. 91), and Count 1 of the indictment was predicated upon this refusal (R. 2).

Later in the hearing, petitioner refused to answer, on the basis of the two grounds given in his written statement, whether he was acquainted with any persons whom he knew to be members of the Communist Party, whether he had ever attended Party meetings, and whether he knew Matilda Landsman. As disclosed at the trial, Matilda Landsman was believed by the Subcommittee to be an employee of the New York Times at the same time petitioner was on the Times, first as a secretary and, after resigning to take linotype training, as a journeyman linotype operator in the typographical department; a member of Typographical Union No. 6; and a member of the Communist Party who had participated in the Party's attempt to take over the Typographical Union (R. 61–62). Petitioner denied having "any knowledge respecting a Communist attempt to take over control of Typographical Union No. 6" or having "discuss[ed] with Matilda Landsman the question of any Communist activity in that union" (R. 93). Following these denials, he was then asked (R. 93):

> Now, for the purpose of testing the credibility of that answer, sir, I will ask you, did you ever have any conversation with Matilda Landsman?

Petitioner refused to answer this question on the grounds set forth in his prepared statement. The chairman ordered petitioner to answer the question on penalty of contempt of the Senate, but petitioner persisted in his refusal based on these same grounds (R. 94). Count 2 of the indictment was predicated upon this refusal (R. 2).

SUMMARY OF ARGUMENT

I

Petitioner cannot excuse his refusal to answer by the alleged lack of pertinency of the questions.

A. A series of decisions by this Court has established that a witness charged with contempt cannot raise at his trial issues which he did not raise before the tribunal before which the contempt occurred—at least when the tribunal might have been able to meet the witness' objection. *E.g., Hale* v. *Henkel,* 201 U.S. 43; *United States* v. *Bryan,* 339 U.S. 323. A Congressional committee can remedy an alleged failure to make the pertinency of the question clear to the witness by fully explaining its pertinency or even by modifying the precise subject under inquiry, if necessary. Thus, this Court has held that a witness before a Congressional committee cannot claim that the committee failed to apprise him adequately of the pertinency of the question unless he makes a specific objection on this ground before the committee. *Barenblatt* v. *United States,* 360 U.S. 109, 123–124; *Deutch* v. *United States,* 367 U.S. 456, 469.

Petitioner did not make even the "contemplated" and "buried" objection to the questions on the ground of lack of pertinency which was made by the witness in *Barenblatt* nor did he indicate any doubt as to the importance of the questions such as was stated by the witness in *Deutch*. He said that he could not understand why he had been subpoenaed, but this objection appears only to raise the issue of "probable cause," a contention which petitioner renews in this Court. Moreover, this general objection was made when petitioner first appeared before the Subcommittee, before any questions were asked; it was not, and could not have been, directed to questions which petitioner did not even know would be asked. When they were asked petitioner gave other, different, grounds for refusing to answer. He never claimed lack of understanding of the pertinency of the questions, and is therefore in no position to raise that issue now.

B. In any event, petitioner was made fully aware of the subject under inquiry. At the beginning of the hearings, the chairman clearly stated that the Subcommittee's purpose was to investigate Communist activity in news media. While petitioner did not appear before the Subcommittee until two days later, he showed his awareness of the contents of the chairman's opening statements as well as of the testimony of two other witnesses before the Subcommittee concerning Communist infiltration of communications. Moreover, petitioner was presumably in the committee room when, only a few minutes before he appeared, two

members of the Subcommittee clearly identified the subject of the investigation as Communist infiltration of newspapers and other methods of communication. And almost all of petitioner's statement giving his reasons for refusing to answer the Subcommittee's questions is devoted to the claim that investigation of the newspaper field violated freedom of the press.

Petitioner claims that four different subjects under inquiry have been stated by the government at various stages of this case. All these statements mentioning other subjects are fully consistent with the assertion that the subject of investigation was Communist activities in news media. For example, this subject is part of the larger subject of Communist activity in the United States generally, while Communist activity on the New York Times is part of Communist activity in news media.

Petitioner also claims that the government gave an oral bill of particulars restricting its proof of the subject under inquiry to Communist activities generally. But the Assistant United States Attorney made clear that he was merely saying that the authority of the Subcommittee included Communism generally—which obviously includes the more particularized subject of Communist activity in news media. Even if there was a variance between the government's proof and the bill of particulars, it is well established that the government can amend its bill of particulars as long as the defense is protected against surprise. If petitioner is correct in his interpretation of the oral bill of particulars, the govern-

ment in effect amended it later. And petitioner has never claimed—and could not claim—that he was surprised by the government's reliance on the Subcommittee's clear statements made at the hearing as to the subject under inquiry.

II

Petitioner's claim that the Subcommittee violated the Fourth Amendment is without merit.

A. Petitioner did not raise this objection before the Subcommittee. Merely to express doubt of the sufficiency of the reasons for calling him was not specific enough to meet the requirement of *Barenblatt* and *Deutch* that objections be brought home to the committee. Thus, this contention was not available when he was tried for contempt.

B. In any event, the Fourth Amendment pertains only to subpoenas *duces tecum*, not to subpoenas to testify. The language of the Amendment itself makes clear that it was intended to protect "persons, houses, papers, and effects" only from improper search or seizure. And this Court has never applied the amendment to subpoenas to testify. While in *Barenblatt, supra, Braden* v. *United States*, 365 U.S. 431, and *Wilkinson* v. *United States*, 365 U.S. 399, the Court indicated that a Congressional committee can subpoena a witness only on the basis of probable cause, it suggested that this requirement resulted from the First Amendment or from the need for a valid legislative purpose; the Fourth Amendment was not even mentioned.

C. Even if the Fourth Amendment can be invoked, it was not violated in this case. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209, which involved an administrative subpoena *duces tecum*, this Court held that the requirement of probable cause under the Fourth Amendment is satisfied if "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." There is no reason to apply a stricter standard to subpoenas to testify than to subpoenas *duces tecum*, or to Congressional committees than to executive agencies. Here, the investigation was authorized by Congress, and had a purpose Congress could order; the questions petitioner was asked were pertinent to the subject under inquiry; and the Subcommittee had a reasonable basis for believing that the petitioner had information which would be of value in the investigation.

III

The Subcommittee's investigation of Communist infiltration of news media did not violate the First Amendment.

A. The record of the hearings and trial shows that the Subcommittee was investigating Communist infiltration of news media, not the news media in themselves. In the *Barenblatt*, *Braden*, and *Wilkinson* cases, this Court established that Congressional committees could, consistent with the First Amendment, investigate Communist activities in education and propaganda; equally, Congress can investigate Communist activities in news media.

B. The Subcommittee's subpoenaing of petitioner was not the result of "indiscriminate dragnet procedures, lacking in probable cause." *Barenblatt* v. *United States, supra,* 360 U.S. at 134. The standard laid down in *Barenblatt*, *Braden*, and *Wilkinson* under the First Amendment is plainly less strict than that applied to arrests or searches and seizures under the Fourth Amendment. Moreover, there is no reason under the First Amendment to apply a stricter standard for subpoenas to testify than the Court applied under the Fourth Amendment in the *Oklahoma Press* case, *supra,* to subpoenas *duces tecum.* In short, the proper standard to be applied when a Congressional committee subpoenas a witness is whether it has a reasonable basis for believing that the witness has information related to the subject under investigation which would be of value to the committee.

Applying this standard, it is clear that the Subcommittee had probable cause to subpoena petitioner. It had heard testimony as to Communist efforts to infiltrate the newspaper field. A reliable informant had written the Subcommittee that a Shelton on the news side of the New York Times was an active Party member in a Communist group on the Times and would be able to give the Subcommittee information as to that group. While the Subcommittee did not have the first name of Shelton and initially made an error in this regard in making out the subpoena, there was only one Shelton on the news side of the Times. Thus, the Subcommittee could be reasonably

certain that the Shelton who was subpoenaed was the man identified as a Party member. But even if, *arguendo,* the Subcommittee did not have reasonable ground to believe that petitioner was a Party member, the Subcommittee was absolutely certain that petitioner had valuable information. For he could at least clarify for the Subcommittee whether he was the Shelton identified by the informant and by other information possessed by the Subcommittee.

IV

Petitioner cannot challenge the grand jury for bias on the ground that it was composed in part of government employees.

A. An indictment is not automatically invalid merely because government employees are grand jurors. Indeed, it is well established that federal employes are not automatically disqualified from serving even on petit juries in federal criminal cases. And this rule has been applied to a case involving a prominent Communist charged with contempt of the House Un-American Activities Committee. *Dennis* v. *United States,* 339 U.S. 162. These principles involving the petit jury apply *a fortiori* to grand juries, since defendants have been traditionally provided far more protection from possible bias as to jurors on petit juries.

B. Petitioner was not entitled to a hearing in order to show that the grand jurors were biased because he failed to allege specific and convincing facts demonstrating the bias of individual grand jurors.

The courts are traditionally reluctant to scrutinize grand jury proceedings. See *Costello* v. *United States*, 350 U.S. 359. The reasons are that an indictment is merely an accusation and does not decide guilt or innocence; thorough scrutiny of grand jury proceedings would mean considerable delay in the administration of criminal justice; and the defendant is guaranteed elaborate trial and appellate protection as to the proceeding at which his guilt or innocence is determined. Moreover, this general reluctance to scrutinize grand jury proceedings is particularly strong with regard to inquiries into the beliefs and prejudices of grand jurors. History shows that grand juries, unlike petit juries, are not expected to be unprejudiced. Rather, they serve as conduits to report the common knowledge of the community to the courts.

This Court has never said what kind of bias, if any, would disqualify a grand juror or what kind of allegations are necessary to require a hearing on this issue. The cases invalidating convictions because of racial or other discrimination on grand juries turn, not on the bias of the grand jurors who were on the improperly constituted grand jury, but on the failure of the grand jury fairly to represent the community. Most other courts which have considered the issue of grand-jury bias have held that bias, no matter how strong, of one or more grand jurors does not invalidate an indictment. But some courts have held that an indictment is invalid if it is shown that individual grand jurors are strongly biased. At the

least, the rule in federal courts must be to require convincing proof of strong bias in individual grand jurors. For in *Dennis* v. *United States, supra,* the plurality opinion stated that even petit jurors are not disqualified unless "actual bias" is shown as to individual jurors; it is not enough to show that government employees generally are impliedly biased as a result of government loyalty and security programs.

Even if we apply the standard in *Dennis,* petitioner did not allege the specific and convincing facts as to individual grand jurors necessary to entitle him to a hearing. Petitioner alleged only that government employees in general were biased and intimidated by the government loyalty and security programs. Moreover, he did not even allege specific facts indicating generally that government employees were biased or intimidated. Thus, petitioner is in effect seeking a hearing in order to conduct a general exploration into the motives and beliefs of some [redacted] grand jurors.

V

The indictment was not required to specify the subject under inquiry. It is well established that indictments in the statutory language are ordinarily sufficient. This principle has been applied by this Court so as to sanction the omission of a specific allegation of materiality in a perjury indictment (*Markham* v. *United States,* 160 U.S. 319, 325), which is closely analogous to the pertinency of questions in a case involving contempt of Congress. Every decision in the courts of appeals has held that

an indictment under 2 U.S.C. 192 need not specifically state the subject under inquiry.

Here the indictment stated, in the words of the statute, that the questions petitioner refused to answer were "pertinent to the question then under inquiry." The indictment provided ample information to prevent a second prosecution for the same offense—the name of the committee, the date of the hearings, and the specific questions which petitioner refused to answer. With respect to preparing his defense, petitioner was clearly apprised at the time of the hearings what the subject under inquiry was, and he could hardly have been in doubt that the transcript of the hearings would be relied on by the government at his trial.

ARGUMENT

I

PETITIONER, HAVING FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS BEFORE THE SUBCOMMITTEE, CANNOT RAISE THE ISSUE FOR THE FIRST TIME AT HIS TRIAL. IN ANY EVENT, PETITIONER WAS APPRISED OF THE SUBJECT UNDER INQUIRY

In *Deutch* v. *United States*, 367 U.S. 456, this Court stated that "two basically different issues" of pertinency are involved in a prosecution for contempt of Congress. One issue arises out of "the prosecution's duty at the trial to prove that the questions propounded by the congressional committee were in fact 'pertinent to the question under inquiry' by the committee." *Id.* at 468. The Court held, in reversing the *Deutch* conviction on that ground,

that pertinency is part of the standard of criminality for contempt of Congress and therefore must be proved by the government even if not challenged at the committee hearing.

Petitioner, however, did not raise this issue in the court of appeals or in his petition for certiorari (see Pet. 2). While petitioner now claims that there was no question under inquiry before the Subcommittee (Pet. Br. 2, 26, 58), this was not the issue on which certiorari was granted and therefore it is not before the Court. Consequently, we do not consider this issue at length in this brief, but merely note here that the actual relevancy of the questions petitioner refused to answer to the subject under inquiry is clear beyond doubt. The subject under inquiry was, as the trial court found (R. 225), Communist infiltration into news media. This subject was shown by the statements of members of the Subcommittee and the testimony of other witnesses before the Subcommittee which were known to petitioner and which, as we will show (pp. 32–33), fully apprised petitioner of the subject the Subcommittee was pursuing. In addition, all the witnesses called by the Committee to testify at the hearings on January 4, 5, and 6 worked in the news media field (see Gov. Ex. 7) and the Subcommittee counsel testified at petitioner's trial that Communist activity in this area was the subject under inquiry (see *supra*, p. 10). The question whether petitioner, who was employed by the New York Times (see *supra*, p. 11), was a member of the

Communist Party (Count 1) is obviously pertinent to the subject of Communist infiltration of the press. Cf. *Wilkinson* v. *United States,* 365 U.S. 399, 413; *Barenblatt* v. *United States,* 360 U.S. 109, 125. As to the question whether petitioner had ever had a conversation with Matilda Landsman (Count 2), the Subcommittee had information that she was an employee of the New York Times and was a member of Typographical Union No. 6 and of the Communist Party (see *supra,* p. 12). The question, as petitioner was told at the hearings, was intended to test the credibility of his earlier answers denying any knowledge of a Communist attempt to take control of Typographical Union No. 6 and denying having discussed Communist activity in the union with Matilda Landsman. Thus, the pertinency of this question to the subject under inquiry is likewise clear.

The other issue as to pertinency noted by the Court in *Deutch* is whether "the pertinency of the interrogation to the topic under the congressional committee's inquiry [was] brought home to the witness at the time the questions [were] put to him" (367 U.S. at 467–468). The Court made clear that any witness who is doubtful about the pertinency of questions must raise the issue before the Congressional committee. He cannot object that the pertinency was not explained to him for the first time at the trial for contempt. As we will show below (pp. 25–32), petitioner did not challenge the pertinency of the questions before the Subcommittee at the hearings, and therefore the Subcommittee had no duty

to apprise petitioner of the subject under inquiry. We will also show (pp. 32–41), however, that petitioner was in fact apprised of the subject under inquiry.

A. THE ISSUE OF PERTINENCY WAS NOT PROPERLY RAISED BEFORE THE SUBCOMMITTEE

Petitioner claims that he was not adequately apprised by the Subcommittee of the subject under inquiry so that he could determine whether the questions asked him were pertinent to this subject. But petitioner failed to raise this objection before the Subcommittee and, under this Court's decisions, is precluded from raising it for the first time in the contempt proceeding.

1. In *Hale* v. *Henkel,* 201 U.S. 43, the witness based his refusal to produce documents on three grounds, one of which was that it was "impossible for him to collect them within the time allowed" (*id.* at 70). The Court indicated that it would not consider this objection because, "[h]ad the witness relied solely upon [this] ground, doubtless the court would have given him the necessary time" (*ibid.*). *United States* v. *Bryan,* 339 U.S. 323, 334, in commenting on the *Hale* case, stated:

> [H]aving refused compliance for other reasons which the lower court could not remedy, the witness could not later complain of its refusal to do a meaningless act—to grant him additional time to gather papers which he had indicated he would not produce in any event.

Similarly, *Bryan* held that a witness who, having been subpoenaed to appear and produce records be-

fore a Congressional committee, appears but refuses to produce the records, may not raise at his trial for the first time the issue whether a quorum of the committee was present. The Court stated that "[t]he defect in composition of the Committee, if any, was one which could easily have been remedied. * * * For two years, now grown to four, the Committee's investigation was obstructed by an objection which, so far as we are informed, could have been rectified in a few minutes" (339 U.S. at 333). Moreover, it was apparent that this witness "would not have complied with the subpoenas no matter how the Committee had been constituted at the time. * * * Here respondent would have the Committee go through the empty formality of summoning a quorum of its members to gather in solemn conclave to hear her refuse to honor its demands" (*id.* at 333–334). And in *United States* v. *Fleischman*, 339 U.S. 349, 352, the Court, relying on *Bryan*, stated simply that the issue of a quorum "was raised for the first time at the trial, two years after [the witness'] appearance before the Committee, where she had given other reasons for her failure to produce the documents," and therefore "the defense of lack of quorum was not available to her."

The principles originally laid down by the Court in the *Hale*, *Bryan*, and *Fleischman* cases are fully applicable to the issue whether the witness is sufficiently apprised of the subject under inquiry and the pertinency of the questions to this subject. When a witness challenges the pertinency of a question, the Congressional committee or its counsel can explain

more fully the subject under inquiry and the relationship between the question and the subject. Indeed, the committee can even modify the precise subject under inquiry if that is necessary. Moreover, when a witness relies on other grounds for refusing to answer the question, the pertinency of the question, like the existence of a quorum, is immaterial since the witness would not have answered no matter how clear the committee made the pertinency of the question appear.

In *Watkins* v. *United States*, 354 U.S. 178, the Court stated that "[t]he final source of evidence as to the 'question under inquiry' is the Chairman's response *when petitioner objected to the questions on the grounds of lack of pertinency*" (*id.* at 214; emphasis added). The Court then held that, "[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection of the witness on grounds of pertinency*, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto" (*id.* at 214–215; emphasis added).[2] The footnote to this sentence reads "Cf. *United States* v. *Kamin*, 136 F. Supp. 791, 800" (354 U.S. at 215, note 55). At page 800 of the *Kamin* opinion, then District Judge Ald-

[2] Watkins specifically told the committee that "I do not believe that such questions are relevant to the work of this committee * * *."

rich emphasized the necessity of a specific objection on grounds of pertinency:

> The defendant contends that it is not enough for a question to be pertinent—the witness must be informed of the subject matter, so that he may have a definite standard by which to determine whether he should answer. Because if he was not so informed he admittedly indicated no interest, and did not choose to supplement any deficiency in his knowledge by asking either the Chairman or his own counsel, I regard this contention as immaterial.

The requirement that the issue of pertinency be raised before the investigating committee was made absolutely clear by the holding in *Barenblatt* v. *United States, supra,* 360 U.S. at 123–124. Indeed, the Court stated that the issue is not even raised by a memorandum submitted by a witness to the committee saying that "I might wish to * * * challenge the pertinency of the question to the investigation" and quoting, from an opinion of this Court, "language relating to a witness' right to be informed of the pertinency of questions asked him by an administrative agency." *Id.* at 123. This Court held that "[t]hese statements cannot, however, be accepted as the equivalent of a pertinency objection. At best, they constituted but a contemplated objection to questions still unasked, and buried as they were in the context of petitioner's general challenge to the power of the Subcommittee they can hardly be considered adequate, within the meaning of what was said in *Watkins* * * * to trigger what would have been the Sub-

committee's reciprocal obligation had it been faced with a pertinency objection" (*id.* at 123–124). See also *McPhaul* v. *United States,* 364 U.S. 372, 380–381. And in *Deutch* v. *United States,* 367 U.S. 456, 468, the Court found that "the petitioner was not made aware at the time he was questioned of the question then under inquiry nor of how the questions which were asked related to such a subject." Nevertheless, the Court did not reverse the witness' conviction on this ground since (*id.* at 469):

> [T]he thoughts which the petitioner voiced in refusing to answer the questions about other people can hardly be considered as the equivalent of an objection upon the grounds of pertinency. Although he did indicate doubt as to the importance of the questions, the petitioner's main concern was clearly his own conscientious unwillingness to act as an informer. It can hardly be considered, therefore, that the objections which the petitioner made at the time were "adequate, within the meaning of what was said in *Watkins, supra,* at 214–215, to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt, supra,* at 124.

2. Petitioner in the instant case, who appeared before the Subcommittee with counsel, did not make even the "contemplated" and "buried" objection to the two questions on the ground of pertinency which was made by the witness in *Barenblatt* or indicate any doubt as to the importance of these questions such as was stated by the witness in *Deutch.* In-

stead, petitioner orally stated, after consulting with his counsel, that he objected to the question whether he was a Party member (Count 1) on the grounds of the First Amendment and the Subcommittee's lack of jurisdiction (see *supra*, pp. 11–12). The lengthy legal document which he read to the Subcommittee after being asked this question and which he also invoked after being asked whether he had talked with Matilda Landsman (Count 2) raises, and develops, only these same two grounds concerning the Subcommittee's power to investigate beliefs and associations. It does not even suggest that petitioner was refusing to answer the questions because of their lack of pertinency. And petitioner explictly told the Subcommittee that this written statement, which was obviously prepared by counsel, contained the only grounds he was raising (R. 90).

The only statement made by petitioner at the hearings which could conceivably be construed to have raised the issue of pertinency came at the start of his appearance before the Subcommittee. He then gave as one of his three objections to being called by the Subcommittee (see *supra*, p. 11) that "[I fail to] see why I am involved in this hearing" since no prior witnesses had mentioned him. This objection, however, seems to claim that the Subcommittee did not have probable cause to subpoena him—a contention which petitioner renews in this Court (Pet. Br. 29–53; see *infra*, pp. 41–48, 50–62)—not that the questions asked petitioner lacked pertinency to the subject under inquiry. At the least, this objection does not have the clarity required by this Court in *Barenblatt* and

Deutch (where the witness "indicate[d] doubt as to the importance of the questions" (367 U.S. at 469)) "to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt* v. *United States, supra*, 360 U.S. at 124. Moreover, petitioner made this general objection prior to his being sworn and before any questions had been asked. The objection was not, and could not, have been directed to questions which petitioner did not even know would be asked. When the questions on which Counts 1 and 2 are based were asked, petitioner gave other, different grounds for refusing to answer them.

Petitioner's omission of any objection as to the pertinency of the two questions which were the basis of his conviction is particularly significant since, in response to other questions asked by the Subcommittee—both before and after the two questions which underlie Counts 1 and 2—he specifically objected on the ground of pertinency. Three times in testifying before the Subcommittee in executive session (R. 52, 59, 63) and three times in open session (R. 85, 86, 94) petitioner stated explicitly that he objected to a question because it was not pertinent. For example, in executive session he twice responded, "Is that question pertinent to the scope of this inquiry?" (R. 52, 59). At the hearing during which his contumacy occurred, he stated with respect to other questions: "I don't see the pertinency of the question to the scope of the investigation" (R. 85); "I am raising the question since this is not a question of the investigation of the press, why you are asking why I have written—" (R. 86); "I really must challenge the pertinency of that

question to the scope of the investigations" (R. 94). Thus, petitioner knew how to object to the pertinency of particular questions but, apparently because he understood the pertinency of these two particular questions, deliberately did not raise this objection as to them.

B. PETITIONER WAS APPRISED OF THE SUBJECT UNDER INQUIRY

1. There can be little doubt that petitioner was aware of the subject under inquiry. At the beginning of the hearings on January 4, 1956, the chairman clearly stated that the purpose of the hearings was to investigate Communist activity in the news media field (see *supra*, p. 7). While petitioner did not appear at the hearings until January 6, he showed his awareness of the chairman's opening statement by saying at the hearings that he did not "see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony" (see *supra*, p. 11). Petitioner also showed that he was familiar with the testimony of Winston Burdett and Clayton Knowles—which concerned Communist infiltration of the communications field (see *supra*, pp. 4, 9)— by saying that "[t]here was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles."

Moreover, petitioner was presumably in the room at the beginning of the Subcommittee's proceedings on January 6, 1957, the day he was subpoenaed to appear, and did appear only a few moments later as the first witness of the day. Before petitioner

testified on January 6, the chairman stated that the hearings were directed to investigating infiltration of persons identified as Communists into news agencies. Senator Hennings said (R. 77):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

And petitioner's prepared statement which was read by him before the Subcommittee as his reason for refusing to answer the questions underlying his conviction demonstrates clearly that he knew that the Subcommittee's investigation was into Communist activity in the newspaper field. For almost the entire statement is devoted to the claim that the Subcommittee's investigation of the newspaper field violated freedom of the press guaranteed by the First Amendment (R. 88–89, 90–91).

2. Petitioner contends (Pet. Br. 17–21, 58–60, 67) that the subject under inquiry could not possibly have been made clear to him since different subjects were stated by the Subcommittee at the hearings, by the prosecution and Subcommittee counsel at the trial, and by the district court and court of appeals. Petitioner contends (Pet. Br. 18) that four different subjects have been suggested: (1) Communism generally; (2) Communist infiltration of news media; (3) Communism in the New York Typographical Union or in the New York area; and (4) Communism on the

New York Times. This contention is clearly without merit.

All these subjects except possibly Communism in the New York area are on their face fully and directly consistent with subject number 2, Communist infiltration of news media, which, as we have shown (pp. 32–33), was the subject clearly described to petitioner at the hearing. That subject was obviously a part of Communism in the United States generally, which is the major part of the investigatory authority given the Subcommittee by the Senate. S. Res. 366, 81st Cong., 2d Sess. On the other hand, Communism in the New York Typographical Union and on the New York Times are a part of the subject of Communism in news media. Thus, all these subjects were being investigated at one and the same time. And the pertinency of the questions which petitioner refused to answer was equally apparent to all these subjects.

As to the subject of Communism in New York, this too was the subject under inquiry. For, while the subject was Communist infiltration of news media, the hearing was in fact limited to such Communist activity in the New York area. This can be readily seen from the witnesses who testified. Thus, the Subcommittee, while investigating Communism in news media, was also investigating Communism in New York. Moreover, the only references to this subject as the subject under inquiry were the heading to the transcript of the hearings (Gov. Ex. 7) and testimony of Subcommittee counsel at petitioner's trial (R. 138–139). Thus, even if we assume *arguendo* that petitioner would have been confused if he had

been told when he testified that the Subcommittee was investigating both Communism in news media and in New York, petitioner was not so told.[3]

Indeed, as petitioner implicitly admits (Pet. Br. 18–19), the *only* subject described to petitioner at the hearings was Communist infiltration of news media. Both the district court and the court of appeals held that this was the subject under inquiry (R. 224, 225, 243). We submit that the description of other subjects under inquiry long after the time petitioner refused to answer the questions (particularly when these subjects are fully consistent with the subject which was clearly described to him) cannot possibly mean that the Subcommittee did not apprise petitioner of the subject under inquiry.

2. Petitioner argues (Pet. Br. 60–63) that the oral bill of particulars furnished prior to trial makes the subject under inquiry that stated in the resolution authorizing the Internal Security Subcommittee, *i.e.*, Communist activities generally, and that this Court held in *Watkins* v. *United States*, *supra*, that this resolution is not sufficiently precise to apprise a witness of the subject under inquiry. Thus, petitioner argues, the government cannot rely on evidence showing that petitioner was apprised that the subject under inquiry was the lesser, more specific inquiry of Communist infiltration in the news media field.

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[3] In addition, little importance can be attached to the headings subsequently placed on particular hearings. As the chief counsel of the Subcommittee testified in *Liveright* v. *United States*, No. 11, this Term, the headings are applied merely "to keep the evidence in a reasonably dispensable channel" (J.A. 119–120).

At a hearing on defendant's pre-trial motions, government counsel gave an oral bill of particulars in response to an oral motion, in which he stated, regarding the subject under inquiry, that the inquiry was being conducted pursuant to the Senate resolution authorizing the Subcommittee and for the purposes contained in that resolution (R. 19–20). The resolution authorized investigation of Communist activities generally. Considering the oral bill of particulars in context, it is apparent that this reply by the Assistant United States Attorney was not intended to preclude the government from introducing evidence that the subject under inquiry was the more specific subject of Communist infiltration of the press. The latter subject is merely one portion of the broader subject of Communist activities in general, which the resolution authorizes the Subcommittee to investigate. When the Subcommittee is investigating the narrower problem of Communist infiltration of the press, it is simultaneously investigating the broader subject which it is authorized to investigate. The introduction of evidence on the narrower problem was therefore consistent with the statement of the Assistant United States Attorney that the subject under investigation was the full scope of the Subcommittee's authority.

While the Assistant United States Attorney did state that there was no "smaller, more limited inquiry being conducted" (R. 20), he apparently meant that the Subcommittee was not *restricted* to showing any inquiry less than the full authorizing resolution. In fact, he specifically said that his remarks as to the

exact subject under inquiry should not be taken to limit the scope of the government's proof at the subsequent trial (R. 17):

> That [the subject under inquiry] is a matter of fact that will come out at the trial and the proof. [Petitioner] is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

Again indicating that he was not limiting the Subcommittee's general power to investigate Communism wherever found, the Assistant United States Attorney stated (R. 17):

> Let us assume that the particular inquiry at the moment might have been subversive activities in the field of education. That does not limit and does not restrict the full authority that was granted to this committee by the resolution and, therefore, the committee, through this subcommittee, could make all inquiries that were authorized by it to make.

From these statements it is apparent that the government was not denying that the Subcommittee was conducting a particularized inquiry. While resisting a specification of the subject under inquiry because the indictment was "sufficient, without further particularization, to inform the defendant of the charge that he must meet and to protect him from a second prosecution" (R. 18), the Assistant United States Attorney was at the same time insisting that the Sub-

committee was entitled to pursue the full extent of the powers provided by the Senate. Thus, his statement at the trial did not preclude the government from introducing evidence that the more specific subject under inquiry when petitioner was questioned was Communist infiltration of the press.

Even if we assume, *arguendo*, that the Assistant United States Attorney intended to restrict the government's proof of the subject under inquiry to Communist activities in general, this still did not preclude the government from offering evidence at the trial that the particular subject under inquiry at petitioner's hearing was Communist activities in the area of the press. While a variance between an indictment and the proof introduced is fatal if it relates to a matter of substance (see *Stirone* v. *United States*, 361 U.S. 212), the variance between a bill of particulars and the proof is fatal only if the defendant has been prejudiced. *United States* v. *Albanese*, 224 F. 2d 879 (C.A. 2); *United States* v. *Costello*, 221 F. 2d 668, 675 (C.A. 2), affirmed, 350 U.S. 359; *Neal* v. *United States*, 185 F. 2d 441 (C.A. D.C.), certiorari denied, 340 U.S. 937; *Shayne* v. *United States*, 255 F. 2d 739, 743–744 (C.A. 9), certiorari denied, 358 U.S. 823; *McKenna* v. *United States*, 232 F. 2d 431, 436–437 (C.A. 8).

This difference between the cases where the variance involves an indictment or a bill of particulars reflects their significantly different functions. The Fifth Amendment guarantees that a person charged with a felony be indicted by a grand jury and that the in-

dictment contain the essential elements of the crime. If the government offers proof at trial inconsistent with one of the essential elements charged, it cannot be assumed that the grand jury would have been willing to return an indictment with a charge conforming to the proof actually introduced. Thus, in such circumstances the government is in effect attempting to convict the defendant of a crime for which he was not indicted. See *Stirone* v. *United States, supra,* 361 U.S. at 217.

On the other hand, a bill of particulars is simply designed to give the defendant sufficient details of the charges against him so that he can adequately prepare his defense and not be surprised by the evidence offered by the prosecution. *Dunlop* v. *United States,* 165 U.S. 486, 490–491; *Braden* v. *United States,* 272 F. 2d 653, 662 (C.A. 5), affirmed, 365 U.S. 431; *McMullen* v. *United States,* 96 F. 2d 574, 579 (C.A. D.C.). Since the prosecution and not a quasi-judicial body like the grand jury provides the bill of particulars, the government is entitled to amend its bill of particulars at any time so long as the defense is not surprised or otherwise prejudiced by the amendment and subsequent variance between the government's proof and the original bill. Rule 7(f), Federal Rules of Criminal Procedure; *United States* v. *Bender,* 218 F. 2d 869, 874 (C.A. 7). Although the government in this case did not go through the technicality of amending the bill of particulars, if the government's proof was inconsistent with the bill, "the effect of what it did was the same" (*Stirone* v.

United States, supra, 361 U.S. at 217); thus, just as if the bill of particulars had been formally amended, there can be no complaint unless the variance between the government's proof and the bill surprised the defendant and thereby unfairly prejudiced his defense.

Petitioner does not claim, and has never claimed, that his defense was surprised or otherwise prejudiced by any variance between the government's oral bill of particulars and the proof it offered at the trial. If petitioner was prejudiced, this fact was of course apparent to him when the government introduced the evidence which he claims conflicts with the bill of particulars. And if this objection had been properly raised at the trial, any prejudice could have been cured by granting petitioner a continuance so that he could prepare his defense to the government's evidence. See *United States* v. *Neff,* 212 F. 2d 297 (C.A. 3).

In any event, the record demonstrates that petitioner was not prejudiced by the alleged variance between the government's bill of particulars and its proof of the subject under inquiry. Petitioner clearly came to trial adequately prepared to rebut the government's evidence that the Subcommittee was considering Communist infiltration in the news media field, for this was the Subcommittee's sole interest at both the executive and public sessions at which petitioner testified. The transcripts of both these hearings were of course public documents which were readily available to petitioner and his counsel. In

addition, during both of petitioner's appearances before the Subcommittee he objected to the investigation of Communist activity as infringing on freedom of the press (see *supra*, pp. 6–7, 11–12). And, at the trial, petitioner's counsel had charts respecting the newspaper affiliations of the other witnesses called by the Subcommittee at the public hearings at which petitioner testified (R. 148–149).

In short, it is plain that petitioner knew long before his trial that the government would attempt to prove that the specific subject under inquiry by the Subcommittee was Communist activity in the communications field. His failure to object on the ground of surprise when the government introduced this evidence undoubtedly reflects his belief that there was no variance between the proof and the bill of particulars, or his agreement that the variance in no way surprised or prejudiced him.

II

THE SUBPOENAING OF PETITIONER TO TESTIFY BEFORE THE SUBCOMMITTEE DID NOT VIOLATE THE FOURTH AMENDMENT

A. PETITIONER CANNOT RAISE THIS OBJECTION FOR THE FIRST TIME AT HIS TRIAL

Petitioner urges (Pet. Br. 29–53) that the subpoena issued to him violated his rights under the Fourth Amendment because the Subcommittee did not have probable cause to believe that he possessed information relevant to the pending inquiry.

We have seen, however, that this Court has repeatedly held that a witness who refuses to produce

documents or testify before a Congressional committee must present his legal objections before the committee (see *supra*, pp. 25–29). If he fails to do so, it is established that objections cannot be raised for the first time at his trial for contempt. This principle has been applied by this Court to constitutional claims in a case where a witness refused to answer questions propounded by a grand jury. In *Ullmann* v. *United States*, 350 U.S. 422, 439, note 15, the Court refused to consider First Amendment issues on the ground that "it is every man's duty to give testimony before a duly constituted tribunal unless he invokes some valid legal exemption in withholding it." Moreover, in *Barenblatt* v. *United States*, *supra*, 360 U.S. at 123–124, and *Deutch* v. *United States*, 367 U.S. 456, 469, the Court held that buried and anticipatory objections and suggestions of doubt are not sufficient to raise an objection before a Congressional committee.

Petitioner here at no time objected to the Subcommittee that the subpoena violated the Fourth Amendmend. As we have seen above (pp. 29–30), although petitioner submitted a lengthy legal document to the subcommittee, his sole contentions were that the subcommittee was violating his rights under the First Amendment and that it lacked jurisdiction to investigate beliefs and associations. While he did state that he did not understand why the Subcommittee had subpoenaed him (R. 84) and that he was subpoenaed by accident (R. 89), this was part of his contention that the Subcommittee was violating his First Amendment rights. Certainly, this claim was not clear enough to raise a Fourth Amendment claim under

the test of specificity laid down by this Court in *Barenblatt* and *Deutch*.

Petitioner claims (Pet. Br. 33 at note 9, 57 at note 53) that he could not have waived his Fourth Amendment contentions since probable cause is an element of the offense. He reasons that the statute punishes only refusal to answer questions pertinent to a pending inquiry. *Deutch* v. *United States, supra,* 367 U.S. at 469–471. But this is not the same as probable cause. Even though petitioner has not raised the contention, we have shown (pp. 23–24) that the questions here were clearly pertinent. The issue as to probable cause is entirely different—whether the Subcommittee could reasonably believe that petitioner had information of value to it in response to pertinent questions.[4]

B. THE FOURTH AMENDMENT DOES NOT APPLY TO SUBPOENAS TO TESTIFY

Even if petitioner had raised a claim under the Fourth Amendment when he appeared before the Subcommittee, the Amendment does not apply to subpoenas to testify. The Fourth Amendment of course protects witnesses who appear before Congressional committees. But we submit that the Fourth Amendment, unlike the First and Fifth, pertains only to subpoenas *duces tecum*. The language of the Amendment itself makes clear that it was intended

[4] Petitioner also claims (Pet. Br. 32, note 9) that the government cannot raise this contention because it failed to argue it in the district court or the court of appeals. A respondent is entitled, however, to raise new grounds to support a judgment below, even though the party attacking the judgment cannot do so. *E.g.*, *Jaffke* v. *Dunham*, 352 U.S. 280, 281.

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to protect "persons, houses, papers, and effects" from improper search or seizure and not, like the Fifth Amendment, to protect witnesses from being forced to testify.

This Court has never held that the Fourth Amendment is relevant to subpoenas requiring witnesses to appear and testify. In *Boyd* v. *United States,* 116 U.S. 616, and other cases cited by petitioner (Pet. Br. 34, 36–38), the Court decided that the Fourth Amendment applies to subpoenas *duces tecum,* as well as to forcible searches and seizures, because the "compulsory production of a man's private papers" "accomplishes the substantial objects of [the] acts" of "forcible entry into a man's house and searching amongst his papers." 116 U.S. at 622. In contrast, the requirement that a person appear briefly before a Congressional committee does not accomplish the substantial objects—or interfere with his rights to the same extent—as seizure of his person by arrest.

Petitioner's principal authority (Pet. Br. 35–36) for the proposition that the Fourth Amendment applies to subpoenas to testify other than the cases which concern subpoenas *duces tecum* is a general statement in the dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U.S. 438, 478:

> The makers of our Constitution * * * conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whether the means employed, must be deemed a violation of the Fourth Amendment.

This extremely broad statement has never been accepted by a majority of the Court. In addition, it was directed at physical invasions of privacy or their equivalent such as wire-tapping—which was the intrusion involved in that case. For the statement is based on a synopsis and citation of cases (see 277 U.S. at 477–478, and notes 4–10) involving physical invasion of privacy (*e.g., Weeks* v. *United States,* 232 U.S. 383), or improper use of subpoenas *duces tecum* which this Court has held have substantially the same effect as a physical invasion (*Boyd* v. *United States, supra*).[5]

The only decisions of this Court (which we or petitioner have discovered) indicating that probable cause is required in order to subpoena a person to testify are *Barenblatt* v. *United States,* 360 U.S. 109, *Braden* v. *United States,* 365 U.S. 431, and *Wilkinson* v. *United States,* 365 U.S. 399. In all of these cases, however, the Court discussed probable cause in terms of the First Amendment or a valid legislative purpose, not the Fourth Amendment. In the *Barenblatt* case, the Court stated (360 U.S. at 134): "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable

[5] Petitioner quotes (Pet. Br. 34) from *Sinclair* v. *United States,* 279 U.S. 263, 292, that persons are "exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures * * *." The rest of the sentence, however, was "in respect of their personal and private affairs." The issue was thus whether the committee had a valid legislative purpose, not probable cause—*i.e.*, the issue was whether Congress has power to question persons as to non-legislative matters, not whether the Fourth Amendment forbids inquiry whether for a legislative purpose or not.

cause for belief that he possessed information which might be helpful to the Subcommittee." This statement suggests that if a witness was subpoenaed as the result of "indiscriminate dragnet procedures, lacking in probable cause" he might be freed from having to answer the questions. But the statement is clearly part of a discussion of a witness' rights under the First Amendment. Similarly, in *Braden* v. *United States*, 365 U.S at 435, the Court stated that "[t]he subcommittee had reason to believe that the petitioner was a member of the Communist Party, and that he had been actively engaged in propaganda efforts." At the end of this paragraph, the opinion said that "[u]pon the reasoning and authority of *Barenblatt* * * * we hold that the judgment is not to be set aside on First Amendment grounds" (*ibid.*). And in *Wilkinson*, in discussing whether the committee had a valid legislative purpose, the Court similarly said (365 U.S. at 412): "It is to be emphasized that the petitioner was not summoned to appear as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that he possessed information which might be helpful to the subcommittee."

C. IF THE FOURTH AMENDMENT DOES APPLY, IT WAS NOT VIOLATED IN THIS CASE

If the Fourth Amendment does apply to subpoenas to testify, we submit that it is less strict with regard to Congressional investigations, which merely seek testimony, than for arrests or searches and seizures. In *Oklahoma Press Publishing Co.* v. *Walling*, 327

U.S. 186, this Court held that the test to be applied under the Fourth Amendment when an administrative agency issues subpoenas *duces tecum*[*] is markedly different from the standard applicable to warrants (*id.* at 208–209):

> It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.

There is no reason to apply a stricter standard to subpoenas to testify than to subpoenas *duces tecum* or to Congressional committees than to executive agencies.

Applying these standards to this case, the Subcommittee clearly had authority from Congress to investigate Communist activities (S. Res. 366, 81st Cong.,

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[*] As we have indicated (pp. 43–45), the Fourth Amendment does apply to subpoenas *duces tecum* as contrasted with subpoenas to testify.

2d Sess.; see the government's brief in *Liveright* v. *United States*, No. 11, this term) and such an investigation is within the power of Congress to conduct (*Barenblatt* v. *United States*, *supra*, 360 U.S. at 125–134). And as we show elsewhere, the Subcommittee asked questions which were pertinent to the subject under inquiry (*supra*, pp. 23–24) and had a reasonable basis for believing that petitioner had information in answer to these questions which would be of value in the investigation (*infra*, pp. 50–62). Thus, even if the Fourth Amendment applies to subpoenas to testify, as contrasted with subpoenas *duces tecum*, the subpoenaing of petitioner was fully consistent with the Fourth Amendment.

III

THE SUBCOMMITTEE'S INVESTIGATION OF COMMUNIST INFILTRATION OF NEWS MEDIA DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner contends (Pet. Br. 53–57) that the Subcommittee's investigation of the press violated the First Amendment. The subject under inquiry when petitioner testified before the Subcommittee was Communist infiltration into news media, and particularly the press (see *supra*, pp. 23, 32–41). This Court has made clear that such a Congressional investigation of Communist activity in a field protected by the First Amendment is constitutional. In *Barenblatt* v. *United States*, *supra*, 360 U.S. at 125–134, the Court held that Congress could legitimately investigate Communist infiltration of education. Last Term, in *Braden* v. *United States*, 365 U.S. 431, the Court,

in upholding a Congressional investigation of Communist propaganda activities, stated that (*id.* at 435):

> * * * *Barenblatt* did not confine congressional committee investigation to overt criminal activity, nor did that case determine that Congress can only investigate the Communist Party itself. Rather, the decision upheld an investigation of Communist activity in education. Education, too, is legitimate and protected activity. Communist infiltration and propaganda in a given area of the country * * * are surely as much within its pervasive authority as Communist activity in educational institutions. * * * Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts * * * was surely not constitutionally beyond the reach of the subcommittee's inquiry.

And in *Wilkinson* v. *United States*, 365 U.S. 399, 413–414, the Court similarly upheld Congressional investigation of Communist propaganda activities, stating that this issue was "thoroughly canvassed by us in *Barenblatt*." Just as Congress can investigate Communist activities in education and propaganda, fields equally protected by the First Amendment, so Congress and therefore this Subcommittee could investigate Communist infiltration of communications and the press.

A. THE SUBCOMMITTEE WAS INVESTIGATING COMMUNIST INFILTRATION OF NEWS MEDIA, NOT NEWS MEDIA IN THEMSELVES

Petitioner contends (Pet. Br. 53–55), however, that the Subcommittee was in fact investigating the press

(or the New York Times), not Communist infiltration of news media. But this is squarely contradicted by the record and by the findings of the district court (R. 225–226). The chairman and another member of the Subcommittee (Senator Hennings) explicitly stated at the hearings (*supra*, pp. 7–8, 9), and Subcommittee counsel testified at petitioner's trial (*supra*, p. 10), that Communist infiltration of the press, not the press itself, was under investigation. All the questions asked petitioner were either directly related to Communist activities or were preliminary inquiries intended to lead up to such questions. After petitioner had testified, the Subcommittee asked other newspaper employees similar questions concerning Party activities (see, e.g., Hearings, Part 17, 1739–1743, 1761–1763, 1769–1774, 1777–1784, 1785–1787, 1790–1791). In addition, the record shows that the questions were not a mere fishing expedition, as the Subcommittee had information that Communists had infiltrated into the press (see *supra*, p. 4), and this information was confirmed by testimony taken the same day as petitioner appeared (Hearings, Part 17, pp. 1732, 1739–1740, 1777, 1791).

B. THE SUBCOMMITTEE'S SUBPOENAING OF PETITIONER WAS NOT THE RESULT OF "INDISCRIMINATE DRAGNET PROCEDURES LACKING IN PROBABLE CAUSE"

1. In *Barenblatt* v. *United States*, *supra*, 360 U.S. at 126, the Court held that, when a witness is called before a Congressional committee and refuses to testify, determination of any claim under the First Amendment "always involves a balancing by the courts of the competing private and public interests

at stake in the particular circumstances shown." The Court subsequently indicated that "the individual interests at stake [are] not subordinate to those of the state" if the witness' appearance follows from "indiscriminate dragnet procedures, lacking in probable cause * * *" (*id.* at 134). See also *Wilkinson, supra,* 365 U.S. at 412.

The standard laid down in *Barenblatt* and *Wilkinson* is clearly not the same as the "probable cause" required for arrest or search and seizure under the Fourth Amendment. The test under the Fourth Amendment as to arrests or searches and seizures is whether "the facts and circumstances within [the arresting officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" the person has committed an offense or there is contraband in the place to be searched. *Draper* v. *United States,* 358 U.S. 307, 313; *Carroll* v. *United States,* 267 U.S. 132, 162. In contrast, in *Oklahoma Press Publishing Co.* v. *Walling, supra,* 327 U.S. 186, this Court held that an executive officer and therefore *a fortiori* a Congressional committee may, consistent with the Fourth Amendment, issue a subpoena *duces tecum* if "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry" (327 U.S. at 209). We submit that the *Barenblatt* and *Wilkinson* cases laid down a similar rule as to subpoenas to testify, where First Amendment rights are involved—that a Congressional committee may properly subpoena a witness when it has reasonable basis for be-

lieving that the witness has information related to the subject under investigation which would be of value to the committee. See *United States* v. *Orman*, 207 F. 2d 148, 154–155 (C.A. 3).

First, there can be no reason to impose a stricter standard on Congressional committees for subpoenas to testify than for subpoenas *duces tecum* issued by executive agencies as in *Oklahoma Press*. The intrusion is no greater in one situation than the other. Certainly, there is no basis for imposing the same requirements on Congressional committees (before they can subpoena witnesses consistently with the First Amendment) as are imposed on arrests and searches and seizures under the Fourth Amendment. It would be strange to require the same degree of probable cause to arrest a person or use force to enter his house as to ask him questions—particularly when he is protected by the Fifth Amendment from being forced to incriminate himself. And, if Congressional committees must have the kind of proof to subpoena a witness as police do to make an arrest, the result will be seriously to hamper Congressional inquiries. The power of Congress to investigate before it legislates—to question hostile as well as friendly witnesses—is of course of great importance to the legislative process. This power necessarily includes the discretion to subpoena witnesses where there is any substantial likelihood that they possess information of value to an investigation and to possible legislation.

Second, the difference in requirements as to subpoenas on the one hand and arrests and searches and

seizures on the other was indicated in the *Barenblatt* and *Wilkinson* opinions themselves. The Court did not use the phrase "probable cause" alone—thereby conceivably suggesting the same standard as for an arrest or search and seizure under the Fourth Amendment. Rather, the Court indicated that Congressional committees must not use "indiscriminate dragnet procedures, lacking in probable cause for belief that [the witness] possessed information which might be helpful to the Subcommittee" (360 U.S. at 134; 365 U.S. at 412). We submit that this phrase suggests that Congressional committees can properly act if they have reasonable ground for believing that the witness has information which will be of value to their investigation.

Moreover, in determining that the defendant in *Barenblatt* was not subpoenaed as a result of dragnet procedures, the Court cited two earlier portions of the opinion as showing this fact (360 U.S. at 124, 125 at note 24). The first reference is to discussion showing that the witness was apprised by the subcommittee of the pertinency of the questions asked to the subject under inquiry. The second reference is to a footnote which quotes the statement of the chairman of the subcommittee at the close of the witness' testimony:

> * * * the evidence or information contained in the files of this committee, some of them in the nature of evidence, shows clearly that the witness has information about Communist activities in the United States of America, particularly while he attended the University of Michigan.

> That information which the witness has would be very valuable to this committee and its work.

These citations show that this Court was not following the strict standard of probable cause which is applied under the Fourth Amendment for arrests or searches and seizures. The references cited plainly do not meet these standards. As we will see (pp. 55–60), the record in this case gives far more details as to the information possessed by the Subcommittee showing that petitioner had information of value to the Subcommittee than is shown by the two references cited by the Court in *Barenblatt*.

Similarly, in *Wilkinson*, in demonstrating that the defendant had not been subpoenaed as a result of "an indiscriminate dragnet procedure," the Court relied on the testimony of the staff director of the committee, at the trial, that the defendant "was an active Communist leader engaged primarily in propaganda activities" (365 U.S. at 412). The footnote to this statement quotes trial testimony that the committee had earlier heard the testimony of a witness under oath identifying the witness as a Communist and that it had other information that he was leading Communist infiltration in the South. The opinion goes on to say that the staff director's testimony is supported by his statement to the defendant at the committee's hearings and evidence that the defendant had been identified as a Party member at a prior hearing. While, in this case, the Subcommittee did

not have sworn testimony that petitioner was a Party member, this was not the basic evidence relied on in *Wilkinson*. Rather, this sworn testimony was used in *Wilkinson* to support the testimony of the staff director that the Subcommittee had considerable information concerning the defendant's Party activities. Since the testimony principally relied on in *Wilkinson* did not state the source of the committee's information, it is clear that this Court was not using the standard of probable cause which is followed under the Fourth Amendment when arrests or searches and seizures are involved.

2. The trial court, as finder of facts, determined that "[t]he record of this case discloses beyond any reasonable doubt that the subcommittee had information in its possession at the time defendant was initially summoned to appear before it which established a reasonable cause for requiring his testimony" (R. 223). This finding is fully supported by the evidence.

The Subcommittee had heard testimony from a newspaperman and broadcaster, who was a former member of the Communist Party, of Communist efforts, in part successful, to infiltrate and influence the newspaper field (see *supra*, p. 4). Subsequently, as the chief counsel of the Subcommittee testified at petitioner's trial, the Subcommittee received "information that a man named Shelton, who was employed in the news department or city side of the New York Times, was a member of a communist group on the Times, was active in the affairs of that

group, and would be or should be in a position to give the committee information about the activities of that group" (R. 98; see R. 48–49, 116). This information was sent to the Subcommittee in a letter a few months before petitioner testified (R. 98, 186–187). Although the letter was signed with a pseudonym, the identity of the signer was known to the former associate counsel of the Subcommittee, Robert Morris (R. 99–100, 190–191). The same person had sent other letters to the Subcommittee, using the same pseudonym, and the information contained in these letters had been checked and found to be correct (R. 101, 190). As the chief counsel testified (R. 102):

> We had received other letters from this same individual. I knew by the appearance of the letter, the way it was typed and the pseudonym which was signed to it, that it came from the same individual who had given us leads before which proved out and concerning whom Judge Morris had stated that he knew him and that he was a reliable person.

Although the Subcommittee was still unaware of Mr. Shelton's first name, a subpoena was issued, addressed to "Willard Shelton" at the New York Times (R. 105). This was a mistake since Willard Shelton, although a newspaperman, was not employed by the Times and was not sought by the Subcommittee (R. 49, 102). Apparently, as the chief counsel surmised, the error was made in the typing section by someone who supplied the first name of the only newspaperman known to him to be named Shelton (R. 102–103).

The Subcommittee employee who went to New York to serve the subpoena discovered that there was no Willard Shelton on the New York Times (R. 49, 106). The employee was told that a Robert Shelton was employed by the Times and that he was the only Shelton on the editorial or news side (R. 49, 106). The chief counsel concluded that Robert Shelton must be the Shelton described by the informant without a first name and the Subcommittee employee was authorized by the Subcommittee chairman to serve the subpoena on petitioner (R. 106). The employee then added the words "or Robert Shelton" to the subpoena and served it on petitioner (R. 49, 105–106).

Between the time the subpoena was issued and the date of petitioner's appearance before the Subcommittee, the Subcommittee (R. 111):

> * * * made a thorough check of all the sources that were available to us to see what there might be on a Robert Shelton or what there might be on a Shelton who might be the Robert Shelton that we were talking [about]. And we accumulated those things from all the sources available to the committee and then attempted in the hearing to see if this was the same individual.

By this time, the Subcommittee had three, four or five "leads" under the name of Shelton without a first name (R. 111). Therefore, the Subcommittee desired to question petitioner concerning whether he was the Shelton mentioned in the Subcommittee's files (R. 111):

> We had here a man who was Robert Shelton, who was a newspaperman. It was of some importance to the committee, while he was on the stand, to ascertain whether he was the same person as any of these other individuals. It is a procedure which we follow wherever it is possible, where time will permit: we have a witness who may be the same as a person not adequately identified in our files.

When petitioner appeared at the executive session on December 7, 1955, he was advised by Subcommittee counsel that the purpose of his appearance was to clarify the question of identity (R. 52). Petitioner declined to cooperate with the Subcommittee by refusing to answer numerous questions (R. 52–64). The Subcommittee subsequently called petitioner's counsel and told him to have petitioner appear at hearings beginning on January 6, 1956 (R. 66). It was at the latter hearings that petitioner refused to answer the questions on which he was convicted. Thus, the subpoena—on which the mistake was initially made as to Mr. Shelton's first name—was not the basis for petitioner's appearance at the hearings which are directly involved in this case. There was no mistake as to the direction to petitioner to appear at the hearings which resulted in his contempt; the Subcommittee called petitioner's counsel and asked petitioner to appear.

We submit that at the time petitioner appeared at the open hearings the Subcommittee had reasonable ground for believing that petitioner had information that would be of considerable value. The Subcommittee had been informed that there was Communist

infiltration of the press, and also had specific information from a reliable informant that a Shelton on the editorial or news side of the New York Times was a member of the Communist Party. Since petitioner was the only Shelton fitting this description, the Subcommittee had reason to believe that petitioner was a Party member who could testify concerning Party activities in the newspaper field.

Petitioner claims (Pet. Br. 29, note 6), however, that the government cannot rely on information provided by the informant because it refused at trial to produce the anonymous letter which conveyed this information to the Subcommittee. This might be true if "probable cause" was an element of the criminal offense which the government was required to prove. This, however, is clearly not the case. Instead, the *Barenblatt* case shows that "probable cause" is one of several considerations in determining whether First Amendment rights have been violated. Therefore, we submit that, when the Court in *Barenblatt* and *Wilkinson* referred to "dragnet procedures" and "probable cause," it did not mean to suggest that the sufficiency of the information or reasons which cause a committee to call a witness should be subject to plenary judicial review. Rather, we believe, the Court intended at most to require only that Congressional committees present material showing the basis of their decision to subpoena the witness. See *Sacher* v. *United States*, 240 F. 2d 46, 50 (C.A. D.C.), vacated and remanded on other grounds, 354 U.S. 930. Here the Subcommittee's counsel described the information possessed by the Subcommittee as to petitioner's Communist activities. This evidence is sufficient

for a court to decide whether the information described by the Subcommittee constitutes "probable cause," *i.e.*, that it was reasonable for the Subcommittee to believe that it could obtain pertinent testimony from the witness.

In short, we believe that the decision whether to subpoena a witness is mainly for the legislative body. To superimpose on a trial for contempt a full-scale trial of a committee's judgment would be an invasion of the prerogative of the legislature and a serious interference with Congressional investigations. The permissible scope of a Congressional investigation, which of necessity must proceed step by step, is not to be limited by the strict requirements of a criminal prosecution.

Petitioner also quotes (Pet. Br. 8) a statement made by the Subcommittee counsel to petitioner at the executive session that petitioner was not charged with being a Communist and that counsel was greatly surprised when petitioner refused to answer questions (R. 56). Subcommittee counsel, however, fully explained this statement at petitioner's trial on the ground that petitioner had earlier in the executive session strongly indicated to the Subcommittee both by his answers to questions and his demeanor that he was not the Shelton whom the Subcommittee was seeking to question and that therefore the subpoena was wrongly issued (R. 112). Certainly, the statement of counsel at the executive session was not sufficient to overcome all the other evidence in the trial record that the Subcommittee had reasonable ground to question petitioner about Communist infiltration into

news media when he appeared at the public hearings after refusing to testify in executive session.

Even if we assume, however, that the Subcommittee did not have reasonable ground to believe that petitioner was a Party member, the Subcommittee could be absolutely certain that petitioner had valuable information to contribute. This information was whether petitioner was in fact the Shelton described in the information previously given to the Subcommittee. If he was, the meaning of the information already in the files would be clarified and there would be no need to look for another Shelton who was the subject of this information. At the least, the Subcommittee would have information that one Party member was employed, perhaps in a significant capacity, on an important newspaper. In addition, petitioner could then be thought to have information concerning Communist activity in the newspaper field. If petitioner testified that he was not the Shelton described in the Subcommittee's files, this would indicate to the Subcommittee that it would have to look further to find the subject of its information. In short, we submit that a Congressional committee can call a witness for purposes of identification where it has information concerning one of a narrowly defined group of persons. Certainly, it was not likely that there would be a large number of Sheltons on the New York Times.

Clearly, the Subcommittee reasonably believed that petitioner "possessed information which might be helpful to the subcommittee" (*Wilkinson* v. *United States, supra,* 365 U.S. at 412) and "relevant to the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling,*

supra, 327 U.S. at 209. Thus, the Subcommittee could properly subpoena petitioner.

IV

PETITIONER CANNOT CHALLENGE THE GRAND JURY FOR BIAS ON THE GROUND THAT IT WAS COMPOSED IN PART OF GOVERNMENT EMPLOYEES

In his motion to dismiss the indictment, petitioner urged as the ground for granting the motion that the indictment was void and illegal "in that there were less than 12 members of the Grand Jury who concurred in finding the indictment who were free from prejudice or bias against this defendant" (R. 3). Alternative to immediate dismissal of the indictment, petitioner sought a hearing to give him an opportunity to demonstrate the bias (R. 3–4). In support of these contentions, he submitted an affidavit reciting that fourteen of the twenty-three members of the grand jury were employed by the United States Government, and that, being so employed and thus subject to the government's security programs, they were so instilled with the fear of creating the appearance of sympathetic attitude toward any person accused of Communism that they could not consider the facts presented to them with open minds, free from bias and prejudice (R. 4–8). The motion was denied without opinion (R. 19). We submit that the order was correct.

A. THE PRESENCE OF GOVERNMENT EMPLOYEES ON A GRAND JURY DOES NOT AUTOMATICALLY INVALIDATE THE INDICTMENT

Petitioner's broad contention is that a person accused of "refusal to reveal whether he was a member

of the Communist Party and give other information on his Communist connections" (R. 5) is entitled to be indicted by a grand jury on which no government employee sits. This argument is conclusively answered by the cases involving government employees on petit juries. It has long been settled that government employees, in the absence of a showing of actual bias, are not disqualified for service on petit juries in federal criminal prosecutions. *United States* v. *Wood*, 299 U.S. 123; *Frazier* v. *United States*, 335 U.S. 497; *Dennis* v. *United States*, 339 U.S. 162. This is true even though one or more of the employees are employed in the very department charged with responsibility for enforcing the statute which the defendant is charged with having violated. *Frazier* v. *United States, supra.* And the rule was adhered to even though the defendant was a prominent Communist charged with contempt of the House Un-American Activities Committee and where the trial was held after the promulgation of the first "Loyalty Order." *Dennis* v. *United States, supra.* Of course, the accused must be given the opportunity to prove actual bias at the *voir dire* examination and thus to challenge particular government employees for cause (*Dennis* v. *United States, supra*, 339 U.S. at 171–172; *Morford* v. *United States*, 339 U.S. 258), but in this respect government employees occupy no different status from other prospective jurors, any of whom are challengeable for cause when actual bias appears.

The above cases, involving the petit jury, apply *a fortiori* to petitioner's contention as to grand juries.

For, as we shall see below, defendants have traditionally been afforded far more protection from possible bias as to jurors on petit juries than on grand juries.

B. PETITIONER WAS NOT ENTITLED TO A HEARING, IN ORDER TO SHOW THAT THE GRAND JURORS WERE BIASED, BECAUSE HE FAILED TO ALLEGE SPECIFIC AND CONVINCING FACTS DEMONSTRATING THE STRONG BIAS OF INDIVIDUAL GRAND JURORS

1. In our system of justice, the courts have been traditionally and continually reluctant to scrutinize grand jury proceedings. For example, this Court has held that a defendant is not entitled to a hearing in order to challenge an indictment on the ground that the grand jury has considered incompetent or even illegally obtained evidence. *Costello* v. *United States,* 350 U.S. 359; *Lawn* v. *United States,* 355 U.S. 339, 348–350. This judicial reluctance to scrutinize grand jury proceedings is based on at least three related reasons. First, the grand jury has always been a purely accusatory body which does not decide the question of guilt or innocence but merely whether the defendant should be remanded for trial. See *Hale* v. *Henkel,* 201 U.S. 43, 65. As Chief Judge Swan stated, "an indictment is, after all, no more than an accusation." *United States* v. *Remington,* 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907. Second, if the courts allowed defendants to challenge various aspects of the grand jury proceeding, the result would be a second elaborate hearing, in addition to the trial itself, before guilt or innocence was determined. This would mean delay

and inefficiency in the administration of criminal justice. See *United States* v. *Remington, supra,* 191 F. 2d at 252. Finally, the defendant is guaranteed detailed and elaborate protection, both at the trial and appellate levels, as to the proceeding at which his guilt or innocence is determined.

2. The history and purpose of grand juries suggest not only the reluctance of the courts to scrutinize grand jury proceedings in general but also their reluctance to examine in particular the beliefs, motives, and prejudices of the jurors. This can readily be seen from the absence from ordinary grand jury procedures of anything comparable to the *voir dire* examination, the historic guarantee against bias and partiality on the part of members of the petit jury. It reflects the assumption, dating at least from the time of our Constitution, that grand juries were not expected to be unprejudiced.

The grand jury has traditionally served as a conduit to report the common knowledge of the community to the courts. Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 144–145. The fact that it might have formed a prejudgment as to the truth of an accusation was not considered improper (*United States* v. *White,* Fed. Cas. No. 16,679 (C.C. D.C.)); nor was the fact that it might even have prejudices against a possible accused unrelated to the circumstances of the particular case. Cf. *United States* v. *Smyth,* 104 F. Supp. 283, 301 (N.D. Calif.); *United States* v. *Rintelen,* 235 Fed. 787, 789 (S.D. N.Y.); see also *United States* v. *Fujimoto,* 102 F.

Supp. 890, 896 (D. Haw.). The grand jurors took oaths not to allow prejudice to influence their judgment, and this was apparently regarded as a sufficient safeguard.

Although the growth in the size of the communities for which grand juries now act means that they are far less likely than earlier to have prior personal information about their accusations, this same growth also means that grand jurors are more likely to have biases with respect to classes of persons or types of crimes, rather than with respect to the individual accused. A grand jury in a modern urban community will, in the course of its service, have brought before it a wide gamut of crimes and persons. It would be a serious impairment of the work of such juries if defendants were free to invalidate indictments on a showing, in general terms, that there were community prejudices of one sort or another probably operating on the grand jury to their disadvantage, or to be free to delay the process of a criminal case by demanding a hearing in order to rummage among the thoughts of individual grand jurors to discover possible prejudices. A "trial of the grand jury," particularly on the basis of unsubstantiated allegations, would be a serious obstacle to disposing expeditiously of criminal charges on their merits. And it would be a serious addition to the burdens incident to service on grand juries. It follows, therefore, that the practical operation of the grand jury system requires, as we show below the cases hold, that a showing of grand jury bias must be strong and specific and relate to in-

dividual grand jurors to invalidate an indictment, and that, absent an allegation of facts which if proven would constitute such a showing, a general exploration to discover such bias cannot be permitted.

3. This Court has never said what kinds of bias, if any, would disqualify a grand juror or what kind of allegations are necessary in order to require a hearing on this issue. In *Hale* v. *Henkel,* 201 U.S. 43, 59, the Court said that it is the function of a grand jury "to stand between the prosecutor and the accused." See also *Ex parte Bain*, 121 U.S. 1, 10–11. This means that a grand jury which was merely the tool of the prosecution would not be a proper grand jury; but it sheds very little light on any criteria by which to judge whether a particular jury is, in fact, a tool of the prosecution. Certainly, not every circumstance which might indicate bias on the part of one or more grand jurors would indicate that the jury was so pliant that it would do whatever it was told. Similarly, in *Lawn* v. *United States*, 355 U.S. 339, 349, and *Costello* v. *United States,* 350 U.S. 359, 363, the Court indicated that an indictment must be returned by an unbiased grand jury. But again no standards which would require dismissal of the indictment were sugggested.

There is only one group of cases in which this Court has considered squarely the composition of grand juries. In these cases, the Court has insisted that grand jury panels be broadly representative of the community, and has struck down indictments returned by grand juries drawn from panels from which particular groups—for example, persons of Mexican an-

cestry, Negroes, and women—had been deliberately excluded. *Hernandez* v. *Texas*, 347 U.S. 475; *Cassell* v. *Texas*, 339 U.S. 282; *Ballard* v. *United States*, 329 U.S. 187; cf. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (wage earners). In so holding, a plurality opinion of the Court has indicated that an accused is entitled to indictment by a "fair and impartial grand jury" (*Cassell* v. *Texas*, *supra*, 339 U.S. at 282), which suggests that a grand jury made up with systematic discrimination cannot be fair and impartial in considering matters involving persons from the excluded group.[1]

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[1] Cf. *Strauder* v. *West Virginia*, 100 U.S. 303, 309, which dealt with petit jury panels from which Negroes had been deliberately excluded:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State should deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the states to extend equality of protection.

Nonetheless, we submit that this Court's decisions holding that the arbitrary exclusion of entire groups from grand juries is unconstitutional do not rest in any substantial way on the view that members of the excluded group may be subjected to improper biases if grand jurors are drawn solely from the excluding group. Rather, those cases turn principally on the ground that the grand juries so chosen are unrepresentative of the community, and therefore are not proper grand juries—a ground which reflects the history of grand jury proceedings to which we referred above. It is plain that it is not merely general prejudice against the accused's class that is involved, because the remedy of the Court has been to require the selection of grand jury panels without the arbitrary exclusion. Such a remedy does not provide for the exclusion of those who might still be prejudiced or the inclusion of those from the formerly excluded class in every case involving other members of the class; it merely insures the presence, at random, of the previously excluded group on grand jury panels, although not necessarily on particular grand juries. Any serious prejudice against members of the previously excluded group is not likely to be erased or rendered ineffective by the inclusion of members of that group on a jury panel, and even the inclusion of a member on a particular grand jury would not prevent other grand jurors from voting in accordance with their prejudices.

Thus, the Court has implicitly recognized in these decisions that various general community prejudices are not a basis for challenging an indictment which has been returned by a grand jury, so long as the

panel from which the jury was drawn was representative of the entire community, with the resulting assumption that any given grand jury, drawn by lot from the panel, will similarly be representative of the community.[8] In short, it is not possible prejudice which the decisions of the Court have sought to guard against, but rather unfair representation. The rule which petitioner asks the Court to adopt in this case, on the other hand, would insure precisely the opposite result—grand juries which are not representative of the community, particularly in the District of Columbia—for it would systematically exclude from such juries all members of a certain class, namely, government employees.

Most of the courts which have considered the issue of grand-jury bias have held that, in the absence of a statute, bias on the part of one or more grand jurors does not invalidate an indictment.[9] See, *e.g.*, *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D. N.Y.); *United States* v. *Smyth*, 104 F. Supp. 283, 300–301 (N.D. Calif.); *United States* v. *Knowles*, 147 F. Supp. 19 (D. D.C.); see also the cases collected in support of this proposition in Annotation, *Prejudice of Member of Grand Jury Against Defendant as Ground of Attack on Indictment*, 88 A.L.R. 899, and 24 Ameri-

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[8] Cf. *Ruthenberg* v. *United States*, 245 U.S. 480 (fact that no Socialists were on grand jury held not a basis for challenging indictment).

[9] Cases stating that biased grand jurors may or should be excluded by the judge are of course not controlling as to the issue before the Court, *i.e.*, whether such bias requires that an indictment, on which a defendant has been tried and convicted by an unbiased judge or petit jury, must be dismissed.

can Jurisprudence, *Grand Jury*, § 10. Many courts have so held even on records which strongly showed that some of the grand jurors were biased. See, *e.g.*, *United States* v. *Williams*, Fed. Cas. No. 16,716 (C.C. D.Minn.) (prosecuting witness was a member of the grand jury); *Coblentz* v. *Maryland*, 164 Md. 558, 166 Atl. 45 (indictment against defaulting bank official returned by grand jury some of whose members had lost money as a result of default); *State* v. *Easter*, 30 Ohio St. 542 (murder indictment returned by grand jury which included nephew of deceased); *Rice* v. *State*, 204 Ark. 236, 161 S.W. 2d 401 (indictment returned by grand jury which included unsuccessful political opponent of accused); see also *United States* v. *Caldwell*, 8 Alaska 117, 121–122; *Collins* v. *State*, 3 Ala. App. 64, 67, 58 So. 80.[10]

Some courts, however, have invalidated an indictment when the bias was particularly strong and clear. See, *e.g.*, *State ex rel. Reichert* v. *Youngblood*, 73 N.E. 2d 174 (Ind.) (grand juror reported to have boasted, "I know how I got on the grand jury. We are going to get a Mayor * * *)." There the court quoted with approval (*id.* at 179):

> The general rule is that neither the bias nor prejudice of a grand juror, nor his interest in a prosecution (other than a direct pecuniary interest), nor the fact that he has formed, or expressed an opinion, will so disqualify him as

[10] And California has, by statute, expressly withdrawn an earlier statutory right to challenge a grand juror or attack an indictment on the ground of prejudice. *People* v. *Kempley*, 205 Cal. 441, 446–448, 271 Pac. 478, 480–481.

> to render invalid indictments returned by the grand jury. * * * But we know of no authority which goes so far as to hold that this would be true where jurors had determined, through malice or bribery, to violate their oaths. It is the difference between honest error, to which all men are subject, and the wilful corruption which distinguishes the malefactor.

Even when it is recognized that some kinds of bias may invalidate an indictment, it is required that the showing of that bias be made in specific terms, as to individual grand jurors, rather than in the form of a mere general allegation of prejudice. In *Cleveland* v. *United States*, 146 F. 2d 730, 732–733 (C.A. 10), affirmed, 329 U.S. 14, it was alleged that the indictment against the defendant for violation of the Mann Act and kidnapping resulted from a factional dispute in the Mormon Church, and "that the foreman of the grand jury was a prominent and dominating figure in the high priesthood quorums of the church; that, upon information and belief, a large majority of the grand jurors, if not all of them, were likewise influential members of the church; and that the indictment was returned in a spirit of animosity and enmity toward the defendant." The court rejected this showing as insufficient, stating (146 F. 2d at 732–733):

> Except the ex parte affidavit attached to the motion, which contained many allegations predicated upon information and belief, there was no showing that the foreman or any other member of the grand jury belonged to any particular

> religious sect, or that he bore any animosity, enmity, or prejudice against the defendant. Neither was there any showing that due to prejudice or other like attitude toward the defendant, the foreman or any other member exerted or sought to exert influence with members of the body in bringing about the return of the indictment. Assuming, without so deciding, that the indictments were subject to attack on the ground indicated, the motions and ex parte affidavits, alone and without more, were not enough to warrant the quashing of them.

In *Emspak* v. *United States*, 203 F. 2d 54 (C.A. D.C.), reversed on other grounds, 349 U.S. 190, and *Quinn* v. *United States*, 203 F. 2d 20 (C.A. D.C.), reversed on other grounds, 349 U.S. 155, the witnesses convicted of contempt of Congress claimed, as in this case, that the indictment was invalid because some of the grand jurors were government employees and asked for a hearing at which they could show bias. The defendants in those cases introduced considerable evidence by way of affidavits and exhibits, unlike petitioner, who relied entirely on his counsel's affidavit (see *infra*, pp. 76–77), to show that "a miasma of fear" had developed among government employees due to a loyalty order and investigation which would make them afraid to vote for a person alleged to be a Communist. See *Emspak* v. *United States*, 203 F. 2d at 58–59. The court of appeals rejected the attacks on the indictments in both cases. *Emspak*, 203 F. 2d at 56, 58–60; *Quinn*, 203 F. 2d at 25. The plurality opinion in *Emspak* explained (203 F. 2d at 59):

> No claim was made that any grand juror was biased against this appellant personally. We think that under the circumstances presented to the court there was no indication that Government employees would not be suitable grand jurors in respect of the charge that was before them in this particular case.

In *United States* v. *Remington, supra,* the defendant alleged that the foreman of the grand jury had a financial interest in a book written by the government's chief witness. The Second Circuit, however, refused to allow the defendant the opportunity to examine all the grand jury minutes [11] on a hearing to show that the foreman had unduly influenced the grand jury to secure an indictment. The court reasoned that while "some abuses may thus go uncorrected," "we are unwilling to turn the indictment procedure into a separate trial" (191 F. 2d at 252).

The New York courts have required a specific showing of bias even under a statute which permits a person to challenge a grand juror on grounds of bias. The statute allows such a challenge if it appears "That a state of mind exists on [the grand juror's] part in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion that he cannot act impartially and without prejudice to the substantial rights of the party challenging." New York Code of Criminal Procedure, § 239(6); see also *id.* § 376(2). This

[11] The court ordered the minutes of the defendant's own testimony turned over on other grounds, and said that he could use these minutes to show undue influence.

provision has been interpreted to mean that there must be a showing of actual bias on the part of an individual juror, as contrasted with implied bias, in order to disqualify the juror. *People* v. *Prior*, 268 App. Div. 717, 54 N.Y.S. 2d 150, 153, affirmed, 294 N.Y. 405, 410–411, 63 N.E. 2d 8, 10.

The plurality opinion in *Dennis* v. *United States*, 339 U.S. 162, stated that a defendant is not entitled even to the disqualification of a petit juror in the federal courts unless he can show "actual bias" of particular jurors. *Id.* at 168–172. In *Dennis*, the defendant had been convicted of contempt for refusing to answer questions concerning Communist activities asked by the House Un-American Activities Committee. The defendant claimed that a "Loyalty Order" of the federal government created an aura of surveillance and intimidation which would make it impossible for government employees to judge impartially a case involving Communism. The plurality opinion rejected the defendant's contention on the ground that, while the guarantee of an impartial trial requires that no petit jurors have an actual bias against the defendant, it does not disqualify petit jurors merely because of an "implied bias" resulting from their relationship with the government. As we have indicated above (pp. 63–64), if a defendant must show that individual petit jurors are actually biased in order to disqualify them, *a fortiori* he has at least the same burden in order to disqualify grand jurors. And even if "implied bias" is sufficient to disqualify petit jurors for cause, as the concurring and dissenting

opinions in *Dennis* state, we submit that actual bias is at least required with regard to grand jurors.

4. Petitioner did not allege the specific and convincing facts of strong bias in individual grand jurors necessary to entitle him to a hearing—even if we assume, contrary to the holdings of numerous cases (see *supra*, pp. 70–71), that an indictment can be challenged on the ground of the bias of one or more grand jurors when the allegations are specific, individual, and convincing.

The affidavit in support of the motion for a hearing (R. 4–8) amounted, in substance, to no more than an offer to adduce evidence that there existed among government employees *in general* such a "climate of opinion, fear and intimidation" as to make it likely that any individual employee of the government would be afraid to vote against the return of an indictment in any case which was in any way connected with charges of "Communism, membership in the Communist Party, or association with members of the Communist Party, present and past." These allegations were insufficient for two reasons. First, even if petitioner had alleged specific facts showing deep fear among government employees generally, he failed to allege such fear (as well as the grounds supporting the allegation) as to the individual government employees on the particular grand jury. Thus, even if petitioner's allegations are true, this does not establish that any of the government employees on the grand jury which returned this indictment were intimidated to the extent of disregarding their honest convictions. The lack of specificity as to individual

grand jurors shows that petitioner hoped to conduct a general exploration into the lives and beliefs of the grand jurors. A similar attempt was rejected by the Court of Appeals for the District of Columbia in *Emspak* v. *United States* and *Quinn* v. *United States* (see *supra*, pp. 73–74), where the defendants, unlike petitioner here, introduced affidavits and exhibits providing considerable detail as to fear among government employees generally. Thus, even if a hearing had been awarded and petitioner had proved his allegations, this would not have been a showing of specific and strong bias in a particular grand juror or jurors—which is the only kind of a showing under the decisions that could suffice to invalidate an indictment. Since petitioner's general allegations, assuming *arguendo* that they are correct, were not sufficient to invalidate the indictment, he was not entitled to a hearing in order to prove these insufficient allegations.[12]

Second, petitioner failed even to state the facts which he hoped to show in order to demonstrate that there existed a climate of great fear and intimidation among government employees generally as a result of the security program. His basic contention is that a security program, almost by definition, instills fear. For petitioner merely makes conclusory assertions about a climate of fear (Affidavit, points 7–9, R. 5–6),

[12] The situation is comparable to a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The plaintiff is not entitled to a trial to determine the truth of allegations which, even if true, do not entitle him to relief.

states facts which he hopes to show at the hearing but which he does not swear exist (Affidavit, points 10–11, R. 7–8), and claims that government employees under investigation were asked their opinion of cases involving Communism and Congressional investigatory committees (Affidavit, points 12–13, R. 8). Thus, petitioner is seeking a hearing in order to conduct a general exploration into the motives and beliefs of fourteen grand jurors. No court, as far as we have been able to determine, has ever allowed such a hearing.[12]

V

THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECT UNDER INQUIRY

In his motion to dismiss the indictment, petitioner contended that the indictment was defective for fail-

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[12] The inadequacy of petitioner's demand for a hearing is underlined by the provisions of Rule 6 of the Federal Rules of Criminal Procedure. Rule 6(d) provides that "no person other than the jurors may be present while the grand jury is deliberating or voting." Rule 6(e) provides that the "deliberations and the vote of any juror may be made * * * only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Under these provisions, a grand juror is forbidden, unless upon the order of the court, to disclose to the United States attorney or anyone else in the executive branch of the government how he or any other grand juror voted on a particular matter.

In view of these provisions designed to maintain the traditional secrecy of grand jurors' voting and deliberations in order to protect them from just the kind of harassment conjectured by petitioner, it is highly unlikely that grand jurors are intimidated by the possibility of security proceedings against them into violating their responsibilities.

ure to plead "the nature of the 'question then under inquiry' to which the questions addressed to defendant are alleged to be relevant" (R. 3). It is clear, however, that an indictment which pleads, in the words of the statute, that the questions defendant refused to answer were "pertinent to the question then under inquiry" (R. 1) is, without additional description of the subject under inquiry, sufficient to charge a violation of 2 U.S.C. 192.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

It is well established that indictments in the statutory language are ordinarily sufficient under Rule 7(c). In *United States* v. *Debrow*, 346 U.S. 374, the indictment charged, in the language of 18 U.S.C. 1621, that petitioner committed perjury by "unlawfully, knowingly and wilfully, and contrary to such oath, stat[ing] a material matter which he did not believe to be true." *Id.* at 375. Rejecting the contention that failure to allege the name of the person who administered the oath and his authority to do so invalidated the indictment, this Court stated (*id.* at 377–378):

> The charges of the indictments followed substantially the wording of the statute, which embodies all the elements of the crime, and such charge clearly informed the defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the

> judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. The sufficiency of the indictment is not a question of whether it could have been more definite and certain.

In *Markham* v. *United States*, 160 U.S. 319, 325, the Court held that a simple averment that the false statement "was material to an inquiry then pending" (*id.* at 320) was sufficient to charge the materiality element of a perjury offense. Accord, *United States* v. *Kennefick*, 144 F. Supp. 596, 598 (N.D. Ill.) The holding in *Markham* is directly applicable to the instant case. For the pertinency of the questions (which a witness refuses to answer) to the subject under inquiry by a Congressional committee "is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime." *Sinclair* v. *United States*, 279 U.S. 263, 298. See also *Berger* v. *United States*, 295 U.S. 78, 82; *Hagner* v. *United States*, 285 U.S. 427, 431–433.

It is inconceivable, in the words of *Debrow*, that petitioner could have been misled as to the offense with which he stood charged. Petitioner received ample information from the indictment in order to prepare his defense and to prevent a second prosecution for the same offense. As to the possibility of a second prosecution, the indictment specified the Subcommittee holding the hearings, the time of the hearings, and the questions which petitioner refused to answer at those hearings. With respect to preparing

his defense, petitioner was apprised at the time of the hearings before the Subcommittee as to the subject under inquiry (see *supra*, pp. 32–33), and it was obvious that the transcript of the hearings would be relied on by the government at the trial. Moreover, if petitioner was surprised at trial, he could have moved for a continuance. The test is not whether the government could have alleged the subject under inquiry in the indictment, nor whether such an allegation would have been useful to the defendant—as *Debrow* phrased it, "[t]he sufficiency of the indictment is not a question of whether it could have been more definite and certain" (346 U.S. at 378).

The courts of appeals have expressly held that an indictment alleging that a witness has wilfully refused to answer questions asked by a Congressional committee need not specifically state the subject under inquiry. In *Barenblatt* v. *United States*, 240 F. 2d 875, vacated and remanded on other grounds, 354 U.S. 930, and ultimately affirmed, 360 U.S. 109, the Court of Appeals for the District of Columbia Circuit upheld an indictment which is identical in this respect to the indictment in this case (240 F. 2d at 878):

> * * * it appears that the indictment stated all the elements of the offense charged and served notice on appellant as to what conduct on his part constituted the alleged offense. This satisfies the requirements of Fed. R. Crim. P. 7(c), 18 U.S.C.A.

Likewise in *Sacher* v. *United States*, 252 F. 2d 828 (C.A. D.C.), reversed on other grounds, 356 U.S. 576, the court of appeals, on remand from this Court for reconsideration of the case in light of *Watkins* v.

United States, 354 U.S. 178, stated that (252 F. 2d at 830–831):

> In our view nothing said or implied in the Watkins opinion suggests the Court intended to interpret Rule 7(c), Fed. R. Crim. P., 18 U.S.C.A., to require that an indictment under 2 U.S.C.A. § 192 recite details of the authority and scope of this inquiry. We see no reason to alter our earlier holding that the indictment is sufficient.

And in *United States* v. *Josephson*, 165 F. 2d 82, certiorari denied, 333 U.S. 838, the Court of Appeals for the Second Circuit upheld an indictment which simply said that the defendant refused to testify "on matters of inquiry committed to said Committee" [14] (*id.* at 85):

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[14] It has been suggested that *United States* v. *Lamont*, 236 F. 2d 312 (C.A. 2), holds to the contrary. In that case, the district court held that an indictment under 2 U.S.C. 192 must set forth the authority of the Congressional committee before which the alleged contempt occurred, that the inquiry was within the scope of authority granted to the committee, that the questions which the witness refused to answer were pertinent to the subject matter of inquiry being conducted by the committee, and that the refusals were wilful. 18 F.R.D. 27, 37. The court held that the requirement as to pertinency was satisfied by an allegation that the questions were pertinent. *Id.* at 32. In affirming dismissal of the indictment, the Court of Appeals for the Second Circuit did not reach the issue as to pertinency. It held only that the indictment failed to allege the authority of the committee to conduct the inquiry and found, as a result of judicial notice, that the inquiry was in fact outside the scope of the committee's authorizing resolution and hence its jurisdiction. The court of appeals stated that "[t]he result might well be different were this a case of a committee created by Congress to hold hearings for a specific purpose, with the inquiry in question apparently falling within the assigned purpose" (236 F. 2d at 316, note 6). The court then cited the *Josephson* case, *supra*.

> The above quoted indictment conforms to the requirements of Rule 7(c) * * * and was rightly held sufficient. Indeed, it is a good example of "a plain, concise and definite written statement of the essential facts constituting the offense charged."[15]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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[15] Petitioner does not renew in his brief on the merits the contention which he made in his petition (Pet. 30) that the district court erred in fining petitioner separately in each of two counts. Under 2 U.S.C. 192 each refusal to answer a pertinent question is a separate offense. While *Yates* v. *United States*, 355 U.S. 66, 72–74, holds that a witness can be punished only for one contempt no matter how many questions he refuses to answer if he "carve[s] out an area of refusal" or a "generally defined area of interrogation," petitioner made no general refusal to answer all questions in a particular area. Moreover, the record in this case does not suggest any attempt by the Subcommittee to multiply contempts. See also *United States* v. *Emspak*, 95 F. Supp. 1012 (D. D.C.), affirmed, 203 F. 2d 54 (C.A.D.C.), reversed on other grounds, 349 U.S. 190.

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